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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

No. 868.

STATE OF OHIO ET AL., *Appellants*,

vs.

THE UNITED STATES OF AMERICA ET AL., *Appellees*.

No. 886

THE UNITED STATES OF AMERICA ET AL., *Cross Appellants*,

vs.

STATE OF OHIO ET AL., *Cross Appellees*.

BRIEF FOR ROBERT C. HILL ET AL., RECEIVERS OF THE CONSOLIDATION COAL COMPANY ET AL., APPELLEES IN NO. 868 AND CROSS APPELLANTS IN NO. 886.

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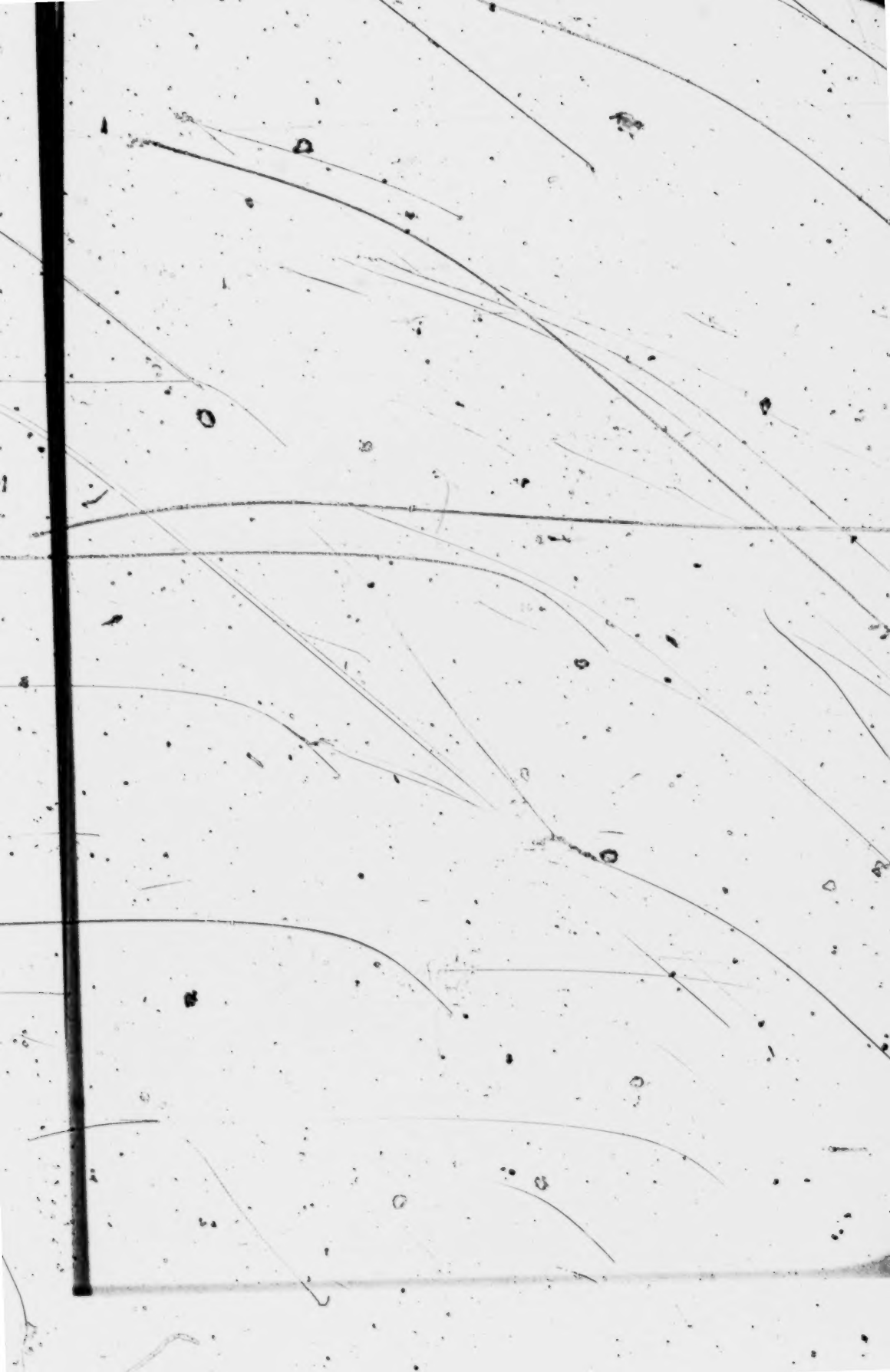

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I.

STATEMENT

This appeal is from decrees of the court below dismissing two bills brought to enjoin an order of The Interstate Commerce Commission pursuant to its report in *Intrastate Rates on Bituminous Coal Within Ohio*, 192 I. C. C. 413 (R. 17-79).

The opinion (R. 466-480) of the court below in dismissing the bills is not yet reported.

This brief is submitted on behalf of The Consolidation Coal Company and its receivers,[1] who operate bituminous coal mines in the Fairmont district[2] in northern West Virginia. In selling coal to consumers in northeastern Ohio,[3] an important market, The Consolidation must compete with producers of coal in Ohio, who sell a very large part of their output in that market.

The report in the proceeding in which the Commission entered the order here under attack is entitled "No. 25566, Intrastate Rates on Bituminous Coal Within the State of Ohio," but, as shown thereby, other proceedings embracing the same or related issues were presented and submitted therewith (R. 17-18). The Consolidation was complainant in docket No. 25670, one of those proceedings, and also intervener in, or party to, each of the other proceedings. It was an intervening defendant in the court below (R. 384-385, 458).

We understand that the briefs for defendants and the intervening defendant carriers, appellees here, will adequately state all issues and pertinent facts. For brevity and convenience, our statement thereof will be confined to such short explanations as will aid the Court in following the argument which we present.

The primary concern of The Consolidation in this litigation is with the relationship between the rates on bituminous coal from the Fairmont district in northern West Virginia and those from the Ohio districts. By its complaint in docket No. 25670 (R. 2047-2056) it attacked, among other things, the rates and relationship of rates to northeastern Ohio established on August 1, 1932,[4] as unreasonable and unduly prejudicial to it and to its traffic, and unduly prefer-

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[1] For convenience hereinafter collectively called The Consolidation.

[2] As described R. 743, 749.

[3] That part of Ohio east of Sandusky, Galion, and Columbus, and north of an east and west line through Columbus.

[4] The reductions were made effective on August 1, 1932, by some lines and on later dates by others. For convenience August 1, 1932, is used herein as the date of the reductions.

ential of its competitors located in Ohio producing districts and of their traffic, in violation of sections 1, 3, and 13 of the Interstate Commerce Act, to the extent that the differences between the rates from the Fairmont district and those from Ohio producing districts to that destination territory exceeded or might exceed the differences which existed prior to August 1, 1932.

This argument therefore is confined mainly to showing that the Commission's order can and should be upheld in requiring the removal of the undue preference and prejudice between persons and localities found by the Commission to exist (R. 64):

> "We further find that the intrastate rates here in issue from eastern Ohio districts to the destinations in northeastern Ohio as defined in this report, are and for the future will be unduly preferential of Ohio shippers and localities and unduly prejudicial against interstate localities and shippers of bituminous coal from the rate districts as hereinbefore defined in Pennsylvania and West Virginia to the same destinations in Ohio."

Evidence before the Commission to support this finding was abundant, substantial, and sufficient. The Commission committed no error of law in making it. The lower court sustained the Commission on this point, stating in its opinion (R. 469-470):

> "* * * on the whole we prefer to place our decision on the single ground of the existence, or non-existence, under the intrastate rates, of preference and prejudice as between persons and localities. We do not believe that it is necessary to decide any other question, for the right of the Interstate Commerce Commission to remove such preference and prejudice, if it exists, is no longer open to dispute. Louisiana Public Service Commission v. Texas & N. O. R. Co., 284 U. S. 125, 131; Florida v. United States, supra [282 U. S. 194], p. 210.
>
> "Nor do we think that it can be disputed, upon the present record, that there is substantial evidence to

support the finding of discrimination against persons and localities, if not, in fact, a demonstration of the correctness of that finding."

The principal production in Ohio is in the Ohio No. 8 district, used herein as representative of the Ohio districts.[5] This district is in the southeastern part of the State, its eastern boundary being the Ohio River. The Pittsburgh district is mainly in western Pennsylvania, but extends through the "Panhandle" of West Virginia to the Ohio River. The Connellsville district is between the Pittsburgh district and the Pennsylvania-West Virginia State line. The Fairmont district, containing mines of The Consolidation, is in northern West Virginia just south of the Pennsylvania-West Virginia State line. (Exhibit 22, Vol. I of Exhibits, p. 143).

For many years prior to August 1, 1932, the rates to northeastern Ohio on bituminous coal from origin districts in Ohio, Pennsylvania, and West Virginia had borne a well-recognized relationship to each other, but on that and later dates this relationship was changed by reductions in the Ohio intrastate rates from most of the Ohio districts under mandatory or permissive orders of the Ohio Commission to certain destinations in northeastern Ohio of which Cleveland is typical,—it is one of the most important,—without corresponding reductions in the interstate rates from the districts in Pennsylvania[6] and West Virginia (Exhibits 14-18, 21-32, Vol. I of Exhibits, pp. 133-137; 142-154; Exhibits 41, 94, Vol. II, pp. 1, 234).

Immediately prior to August 1, 1932, the rate to Cleve-

[5] The other Ohio districts affected are Massillon, Middle, Cambridge, Crooksville, Hocking, and Pomeroy (R. 22-23). Exhibit 22, Vol. I of Exhibits, p. 143, shows the location of all of the producing districts mentioned in these proceedings.

[6] The Pittsburgh & West Virginia Railway reduced the rates from the few mines on its rails in the Pittsburgh district, via certain routes, so as to maintain the old relationship (R. 23). That exception is relatively unimportant to The Consolidation, and for brevity is not again referred to, but should not be overlooked.

land from the Fairmont district was $1.997 per ton, from the Connellsville district $1.90, from the Pittsburgh district generally $1.84, and from the Ohio No. 8 district $1.74; that is, the Fairmont rate was 9 cents higher than the Connellsville rate, generally 15 cents higher than the Pittsburgh rate, and 25 cents higher than the Ohio No. 8 rate, an adjustment of many years standing. On August 1, 1932, the rate from the Ohio No. 8 district was reduced to $1.45. This increased the rate spread of Fairmont over Ohio No. 8 from 25 cents to 54 cents, or by 116 per cent. (R. 755).

The several proceedings before the Commission resulted from those changes.

II.

SUMMARY OF ARGUMENT

We contend that the Commission has made the necessary findings that there is undue preference and prejudice between persons and localities, that such undue preference and prejudice is caused by the Ohio State rates, and that the findings are supported by substantial evidence. There is evidence of the intense competition between Ohio producing districts on the one hand, and the Freeport, Pittsburgh, and Connellsville districts in Pennsylvania and the Fairmont district in West Virginia on the other; that the 4 last named districts have lost to the Ohio producing districts a large amount of business in northeastern Ohio; and that such losses were caused by the reduced freight rates in Ohio. The uncontradicted evidence also shows that the transportation conditions under which the coal is moved to northeastern Ohio are substantially the same from the Ohio districts and from the 4 above named western Pennsylvania and northern West Virginia districts.

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[7] All rates herein are in amounts per 2000 pounds. Those amounts do not include the emergency surcharge of 6 cents, authorized in *Fifteen Per Cent Case, 1931*, 178 I. C. C. 539, 179 I. C. C. 215, 191 I. C. C. 361, which was in effect for a part of the time covered by this controversy but has now expired.

We further contend that the Commission has considered fully all of the evidence with regard to the reasonableness of the interstate rates from the 4 districts, has made the proper findings, and that such findings are supported by substantial evidence.

We contend, therefore, that the Commission has made the necessary findings, amply supported by substantial evidence; that the order is valid; and that, since the Court will not weigh the evidence or substitute its judgment for that of the Commission, but only determine whether there is substantial evidence to support the order, the Court should uphold the order of the Commission and affirm the decrees below, no error of law having been shown.

Our own argument is followed by a reply to appellants' argument, which reply is of such a nature that it cannot be summarized in a way that would be helpful to the Court.

III.

ARGUMENT

1. Commission Made Necessary Findings, Supported by Substantial Evidence, of Undue Preference and Prejudice as Between Persons and Localities.

(a) *Reduced rates have caused Fairmont to lose tonnage to competing Ohio districts.*

The usual annual movement of bituminous coal to seven of the principal markets in northeastern Ohio is from 10 to 15 million tons (Exhibits 47 and 52, Vol. II of Exhibits, pp. 109; 126). In 1931 Ohio furnished 3,161,000 tons, or 34.6 per cent of the total, and the Fairmont district 1,058,366 tons, or 11.6 per cent. The importance of that destination territory for coal originating in Ohio and in the Fairmont district is manifest. Competition in that market is keen between coal originating in Ohio, on the one hand, and in western Pennsylvania and northern West Virginia on the other (R. 659, 662, 664, 669, 675).

The Consolidation, prior to the reductions from Ohio, had been producing in the Fairmont district from three to four million tons of coal annually, about 10 per cent of which, or from three to four hundred thousand tons, had been shipped to and sold in northeastern Ohio, principally in Cleveland (R. 752-753). Immediately after the first of those reductions became effective on August 1, 1932, it began to lose business. Up to the time of the first hearing before the Commission in December, 1932, it had lost to producers in Ohio about sixty-six thousand tons, or approximately fifteen thousand tons per month on the average (R. 757). It had some unexpired contracts under which it continued to ship coal but lost some of them as their terms expired. For instance, immediately after the first hearing The Consolidation lost a contract under which it had shipped to a rubber and tire company in Akron approximately eighty-four thousand tons a year (R. 398, 1467). The Consolidation was advised by letter (R. 1467-1468) reproduced in the margin,[8] that it had lost this business to Ohio producers because of the reduction in intrastate freight rates from the Ohio districts.

[8] "Dear Mr. Snider:

"Thank you for your letter of December 14 with regard to our coal contract. We were quite pleased to go along with the use of West Virginia coal as long as the freight rate made this possible. At the present time, we are still using a majority of West Virginia coal with the result that our company is being penalized a considerable amount due to the reduction in Ohio freight rate, which has now been in effect for some months.

"Our Traffic Department advise that in their opinion, it will be considerable time before there is a definite settlement in freight rate structure of the various coal fields. I also received the opinion from the majority of those coal people calling on us that it will be some time between April and June before a definite decision on this rate structure is made.

"For a number of years, we have used West Virginia coal and have been extremely well satisfied with continuity of quality and service, and it is with considerable reluctance that we feel forced to go to the Ohio field for the major portion of our requirements, which present indications point that we will have to do for our 1933 requirements.

"We have enjoyed our relationship with your company and trust that the rate structure will soon be adjusted so that you will again be in position to contend for a portion of our business.

"Yours very truly,

The Firestone Tire & Rubber Company,
(Signed) R. W. Koch, Purchasing Agent."

The Commission correctly summarizes in the report (R. 56) the testimony offered on behalf of The Consolidation with respect to business lost by it to Ohio producers.

An affidavit filed at the hearing in the court below shows that by reason of the reduced rates in Ohio The Consolidation from August 1, 1932, to the end of May, 1933, had lost two hundred thousand tons, more than half its business in northeastern Ohio (R. 397).

These reduced rates continued to cause The Consolidation to lose approximately 20,000 tons per month down to about the time when the decrees were entered (R. 524).

There was testimony before the Commission (R. 1589) that a Cleveland dealer in domestic coal only had procured in December, 1931, from the Fairmont and Pittsburgh districts 43.5 per cent and from Ohio 12.5 per cent of the coal which it sold, whereas in December, 1932, after the reduced rates had become effective in Ohio, it procured 60.8 per cent from Ohio and only 15 per cent from Fairmont and Pittsburgh.

Other instances of losses to Ohio No. 8 producers by operators in the Pittsburgh and Fairmont districts are given in the record, *e. g.*, pages 831, 857, 861, 1260, 1261, 1264.

Other testimony (R. 771, 848, 1594-1595, 1598-1599) strengthens the showing of intense competition between the Ohio districts on the one hand, and western Pennsylvania, Fairmont, and other districts outside of Ohio on the other hand, for the market in northeastern Ohio, and of shift of tonnage to the Ohio districts as a result of the rate reductions in that State.

The Commission summarizes the evidence and finds that there is competition between coal from Ohio and coal from western Pennsylvania and northern West Virginia, and that the reductions in the Ohio intrastate rates caused the shippers in western Pennsylvania and northern West Virginia to lose business heavily to Ohio shippers (R. 26-27, 56).

It was suggested before the Commission and in the court below that Ohio producers were merely recovering business to which they were entitled, and of which they had been deprived by the alleged improper rate adjustment in effect prior to August 1, 1932. This was not the situation. The Ohio operators did not deny that they were taking business away from northern West Virginia and other districts outside Ohio. Their position was that, in reality, this change was restoring to them the share of the business enjoyed by them prior to the Jacksonville agreement of 1924 (R. 841, 1212, 1219-1220), which provided for a high wage scale and resulted in serious labor difficulties in Ohio. The last normal year prior to that agreement, for which data appear of record, was 1923. During that year the Ohio No. 8, Cambridge, and Middle districts (the principal competing Ohio districts) supplied 42.8 per cent of the total tonnage from all districts to seven important destinations in northeastern Ohio used as illustrative (Exhibits 47 and 52, Vol. II of Exhibits pp. 109, 126). In the year 1931 these districts shipped 33.1 per cent of the total, and the Fairmont district 11.6 per cent. In August, 1932, the first month in which any of the intrastate rate reductions were in effect, those Ohio districts shipped 30.7 per cent. After that their percentage increased steadily month by month until in December, 1932, (the latest figures in the record) it was 55.6 per cent as compared with 42.8 per cent in 1923. The percentage shipped by the Fairmont district decreased from 10.5 per cent in August, 1932, to 7.7 per cent in December, 1932. (These figures are compiled from Exhibits 53, 54, 55, Vol. II of Exhibits, pp. 131-133; Exhibits 368 and 394, Vol. IV, pp. 175; 252.)

Clearly, therefore, this is not a mere recapture by Ohio producers of former tonnage, nor is it a tardy realization of the share to which they would be entitled, as they alleged, under a proper adjustment. As a matter of fact, the rec-

ord shows that in recent years the troubles of the Ohio operators had been due to labor difficulties and not to the rate adjustment (R. 841-842).

The evidence, briefly outlined above, shows a keen and active competition prior to August 1, 1932, between the Fairmont district and the Ohio No. 8 district which obviously could not have existed if the coal produced in the two districts was not of substantially the same character, usable and used for the same purposes. It is true, of course, that some Fairmont coal can be used for metallurgical purposes and the Ohio coal can not, but such metallurgical coal from the Fairmont district can be and is used, also, for general steam purposes. About 60 per cent of the coal shipped by The Consolidation to northeastern Ohio is for general steam and domestic use, and competes with the coal produced in Ohio No. 8 (R. 758, and Exhibit 333, Vol. IV of Exhibits, p. 45).

The State Geologist of West Virginia, formerly of Pennsylvania, and thoroughly experienced, described (R. 733 *et seq.*) the character of the coals in northern West Virginia, western Pennsylvania, and eastern Ohio. He testified that substantially all the coal mined in Ohio No. 8, Pittsburgh, Connellsville, Fairmont and Moundsville districts, the last-named in the "Panhandle" of West Virginia between the Pennsylvania State line and the Ohio River, comes from the widely known Pittsburgh seam of coal, which is not mined commercially to any great extent elsewhere in the area under discussion. He testified, also, that although the coals in the eastern portion of this seam can be used for special purposes, for which the coals produced in Ohio can not, yet on the whole the coals throughout the seam are of substantially the same general character, and may be and are used for general steam and domestic purposes. The analyses given in the record (R. 738) show that coals in Ohio No. 8 and Fairmont districts are very similar.

The record affords no support for the suggestion, put forward before the Commission and on oral argument in the court below, that perhaps lower rates were necessary in Ohio because its coal was so inferior to coal from western Pennsylvania or northern West Virginia that it could not compete with coal from those districts on the old basis of rates.

(b) *To Northeastern Ohio the transportation conditions are substantially the same from the Ohio districts and from the districts in western Pennsylvania and northern West Virginia.*

The transportation service is described in the record in much detail. The witnesses for the principal carriers, the B. & O. Railroad (R. 713 *et seq.*), the Pennsylvania Railroad (R. 701 *et seq.*), and the New York Central Railroad (R. 725 *et seq.*), respectively, testified to the entire service, step by step, in the handling of the coal from placement of empty cars for loading at the mines to delivery of the shipments at destination. Additional testimony as to transportation conditions in Ohio also appears at pages 933-934, 1163-1164 of the record. The testimony of similarity in transportation conditions is not disputed or contradicted, and in fact finds support in the testimony of the only witness as to these conditions for the Ohio interests. That witness, through exhibits showing tractive power of locomotives required to haul one ton one mile, as summarized on Exhibit 331 (Vol. IV of Exhibits, p. 43), showed that, mile for mile, measured by this test whatever it may be worth, there is very little difference in the conditions affecting or surrounding transportation of coal to northeastern Ohio from western Pennsylvania and northern West Virginia, on the one hand, and from Ohio No. 8 and Cambridge, on the other, so that, after all, the main difference between those districts is the distance. But,

as the evidence establishes (R. 1499, 1505, 1511), and as the Commission finds (R. 58):

> "Mileage has always been disregarded to a very great extent in making coal rates from the Appalachian field. See also Lake Cargo Coal Rates, 46 I. C. C. 159, 188; Ohio-Michigan Coal Cases, supra [80 I. C. C. 663]."

and (R. 62):

> "Distance has never been made the sole measure of these rates."

Since the evidence as to transportation conditions did not conflict, was not contradicted, and fully substantiates the findings made, there was no occasion for the Commission to enter into detail. It sufficed to say, as the Commission said (R. 35):

> "Witnesses for petitioning respondents [carriers] are in accord in their testimony that there are no substantial differences between the transportation conditions in eastern and northeastern Ohio and those prevailing from the Pittsburgh group, or any of the other groups west of the mountains in the inner and outer crescent groups,[9] to northeastern Ohio. A witness for the Pennsylvania Railroad testified that a mile of service one place is substantially the same as a mile of service in another place in this general territory."

Followed by the finding (R. 63):

> "It further appears that the movement of such coal from the Ohio points or groups, and to the Ohio territory outlined in Appendix D is at intrastate rates which are generally substantially lower, distance considered, than are the reasonable interstate rates, herein approved, under which such coal is moved to the same destinations from Pennsylvania and West

[9] The Inner and Outer Crescent groups are indicated on Exhibit 22, Vol. 1 of Exhibits, p. 143.

> Virginia; that this disparity in rates is greater than is warranted by the differences in transportation conditions from the Ohio mines, on the one hand, and the Pennsylvania and West Virginia mines, on the other; * * *"

Under the foregoing subdivisions (a) and (b) we have sustained, as we believe, our position that the Commission was amply justified in finding (R. 63):

> "The record fully establishes that the Ohio reductions constitute a real discrimination against and obstruction to interstate commerce and this is especially true under the present economic condition as lower grade coal for domestic and steam purposes than previously was obtained from interstate districts is being obtained from the Ohio districts since the reductions in rates in Ohio."

It has made the necessary evidential findings, and those findings and the evidence fully support its conclusion or finding of ultimate fact (R. 64):

> "We further find that the intrastate rates here in issue from eastern Ohio districts to the destinations in northeastern Ohio as defined in this report, are and for the future will be unduly preferential of Ohio shippers and localities and unduly prejudicial against interstate localities and shippers of bituminous coal from the rate districts as hereinbefore defined in Pennsylvania and West Virginia to the same destinations in Ohio."

The order, therefore, is valid and should be upheld by this Court.

2. Commission's Findings With Respect to Reasonableness Are Amply Supported by Substantial Evidence.

The Consolidation throughout these proceedings has been primarily concerned with removal of the undue pref-

erence and prejudice and not with the manner of its removal.

It, therefore, has not heretofore undertaken and will not undertake now an extended discussion of the subject of reasonableness. But it desires to direct attention briefly to a few indicia that the Commission's findings with respect to reasonableness are properly supported.

The Commission said (R. 64):

> "We find that the rates assailed from the Pittsburgh, Freeport, Connellsville, and Fairmont districts to destinations in northeastern Ohio are reasonable, * * *"

except a few rates reserved for further consideration.

The Commission required establishment and maintenance of rates from the named Ohio districts not lower than those in effect prior to August 1, 1932 (R. 76-78).

Before the Commission and in the court below appellants urged vigorously that the carriers could not be required to increase their intrastate rates in Ohio because those rates were already maximum reasonable rates, or, at least, not below that maximum. In support of that contention they insisted, among other things, that those rates substantially conformed to a scale of coal rates which the Commission, in a thirteen-section proceeding, had recently prescribed for application in Illinois, and from Indiana into Illinois.

In the endeavor to demonstrate that transportation conditions in Indiana and Illinois were substantially similar to those in northeastern Ohio, evidence was introduced by the Ohio operators, through witness Ackerman, of the tractive power of locomotives required in the two territories, respectively, to haul one ton one mile. (The exhibits are summarized on Exhibits 266-267, Vol. III of Exhibits, pp. 305-306).

The Commission carefully considered that evidence and the carriers' reply to it. After devoting about a page of

its report to the subject (R. 33-34), it said (R. 34):

> "We are not convinced that computations based on the rated tractive power of locomotives, even if correctly computed, are an accurate or reliable measure of operating conditions on different lines."

Evidence of like character, much of which was given by this same witness (R. 1389, 1621), has been considered in other cases before the Commission. It is referred to specifically in four reports besides the one now under discussion. In three of them the Commission found that such evidence was not sufficiently accurate to warrant its adoption by the Commission. *West Kentucky Coal Bureau* v. *Illinois Central R. Co.*, 172 I. C. C. 275, 286; *Staunton Brick Co.* v. *Chesapeake & O. Ry. Co.*, 190 I. C. C. 302, 318-319; *Central Pennsylvania Coal Producers Assn.* v. *B. & O. R. Co.*, 196 I. C. C. 203, 211.

In the fourth case it was discussed without any finding by the Commission as to whether it was or was not persuasive. But since the Commission in that case decided against the contention of the complainants, who introduced the evidence, apparently it was not persuaded thereby. *Lake Cargo Coal Cases, 1930*, 181 I. C. C. 37, 46.

The Commission in its report in the instant case discussed those Illinois and Indiana-Illinois rates at length (R. 35-37) and, after being at pains to state: "This evidence has had our consideration" (R. 35), concluded (R. 36):

> "The conditions that led us to establish the basis of rates in the Indiana-Illinois territory are not present in northeastern Ohio."

Other reasons, not mentioned by the Commission, support its action.

In one of those Illinois thirteenth-section cases, docket No. 23130, *Intrastate Rates on Bituminous Coal in Illinois*, 182 I. C. C. 537, the Commission had before it a thirteenth-

section investigation with respect to intrastate rates in Illinois prescribed by the Illinois Commission and therewith a number of complaints filed before the Interstate Commerce Commission assailing the interstate rates from Indiana groups to Rock Island, Ill., etc., and the rates between other points. The Commission in that decision says that the rates from the various origin groups in Illinois were definitely related to each other, as were also rates from the various Indiana groups. In removing the unjust discrimination against interstate commerce which it found to exist, the Commission prescribed certain intrastate rates and in so doing observed the long-standing differential adjustment. For distances under a hundred miles, as the Commission found (182 I. C. C. at p. 551), the group differentials were not generally observed. For those distances it prescribed a scale extending up to 100 miles. The Commission in that decision also observed the differential relationhip in the rates from the Indiana groups.

By a supplemental report and order, 182 I. C. C. 603, it extended the scale up to 130 miles for application on shipments to the Peoria-Pekin area from nearby fields.

In a later case, No. 23922 (Sub-No. 2) *Coal Trade Assn.* v. *Baltimore & O. R. Co.*, 185 I. C. C. 225, a division of the Commission found that the existing rates from the four Indiana groups to destination territory in central eastern Illinois would be unreasonable to the extent that they exceeded a scale there prescribed for distances up to 300 miles. It is this scale, as extended, which appellants insisted should be applied on movements to northeastern Ohio from the several districts of origin considered in these proceedings.

Examination of those three reports will show that the distances over which the coal moved in the territories where the scales were applied were, generally, shorter than from most of the districts here.

The situation can be readily understood from Exhibit 22 (Vol. I of Exhibits, p. 143). The territory of destination in the latter of the two cases just cited is the rectangle in Illinois bounded on the north by the line of the N. Y., C. & St. L. extending eastward from Bloomington, Ill., to the Indiana State line; on the west by the line of the Illinois Central from Bloomington south to Central City and thence by the line of the Southern Railway to Mount Vernon; on the south by the line of the Southern Railway extending eastward from Mount Vernon to the Indiana State line; and on the east by the Indiana-Illinois State line (Exhibit 143, Vol. III of Exhibits, p. 27). As will be seen by reference to Exhibit 22, or to Exhibit 398 (Vol. IV of Exhibits, p. 266), a map of the Illinois situation on a larger scale, this rectangular territory is completely surrounded by origin groups, each of which would have an advantage over the others in distance to some point or points in the rectangle. Thus the scale had the effect of giving to each group at least an equal chance to compete somewhere, even though not everywhere, in the rectangle. To the more distant points, however, such as Rock Island and Moline, Ill., beyond that rectangle, the Commission in both of those decisions still preserved the long-standing differential relationship.

In striking contrast to this Illinois situation the coal groups of origin do not surround northeastern Ohio. All lie to the south and the southeast of the destination territory. Coal from the more distant groups, such as Fairmont, has to move by or through the nearby origin groups, such as Ohio No. 8, to reach the destination territory (see Exhibit 22). Consequently any mileage scale would inevitably result in turning over substantially all of the business to the nearer Ohio districts.

The difference between the two situations is therefore marked, and the record amply supports the Commission's finding that the Illinois rates should not be taken as a measure of the rates to northeastern Ohio.

Nor should the action of the Ohio Commission in this connection pass unnoticed. Although the State of Ohio and the Ohio Public Utilities Commission are here urging that the Interstate Commerce Commission erred in not applying these Illinois rates as a measure in Ohio, as was also urged by the Ohio operators before the Interstate Commerce Commission, yet in only one of the orders of the Ohio Commission, which started the reductions in Ohio, did the Ohio Commission itself use the Illinois rates as a measure in Ohio. Far from that, to the more important destinations, of which Cleveland is typical, it required retention of the differences or differentials existing between the districts in Ohio prior to August 1, 1932. Only in the *Republic Case*, the first one of that series decided by the Ohio Commission, did it use the Illinois rates as a measure (Exhibit 1, Vol. I of Exhibits, p. 1). In the *Empire Case* the Ohio Commission fixed a rate from Cambridge to Mansfield but did not mention the Illinois rates (Exhibit 7, Vol. I of Exhibits, p. 46). In its other orders (except those granting the carriers permission to establish certain rates on less than statutory notice) it simply required that the carriers maintain from Cambridge, Hocking, Pomeroy, and Crooksville districts the same differences over Ohio No. 8 as they maintained prior to August 1, 1932 (Exhibits 5, 6, and 6-A, Vol. I of Exhibits, pp. 34-40, 43).

These orders resulted in a rate to Cleveland, for example, of $1.60 from Crooksville, Hocking, and Pomeroy districts for distances of 171, 199, and 252 miles, respectively, (average distances given by witness Ackerman, R. 1166, 2319), and thus lower than, under the scale in docket No. 23922, would result for these distances, *i. e.*, rates of $1.65, $1.75, and $2.02, respectively (Exhibit 142, Vol. III of Exhibits, p. 26). The old rate, which the order of the Interstate Commerce Commission here under attack requires to be restored, had been $1.89. It is interesting to contrast

these rates of $1.60 and $1.89 from Pomeroy for 252 miles with the $1.99 rate from Fairmont for 257 miles (Exhibit 95, Vol. II of Exhibits, p. 240) found reasonable by the Commission.

It thus appears that the action of the Interstate Commerce Commission in maintaining the former differentials, and in requiring the former Ohio rates to be restored, finds support in the very orders of the Ohio Commission which precipitated the proceedings now before this Court.

IV.

REPLY TO APPELLANTS' BRIEF

This reply to appellants' brief will be confined, as far as practicable, to such parts of it as pertain to the particular points already discussed in the foregoing argument. Presumably other counsel will make such answer to appellants' brief as may be necessary in connection with the discussion in their briefs.

1. Appellants' Contention That They Were Denied a Full Hearing.

In appellants' Summary of Argument (pp. 6-7) this contention is stated as follows:

> "The appellants contend that they were denied a full hearing by the Commission in that the Commission prejudged the question whether the reduced Ohio rates were lawful, as appears, first, by the first sentence of the report; second, by the Commission's attempt to marshal the evidence so as to support its predetermination that the reduced Ohio rates were unlawful; and, third, by the Commission's resort to a presumption against the legality of the reduced Ohio rates irrebuttable in practice and without which its predetermination could not have been supported."

Thus the gravamen of the charge is prejudgment, or predetermination, constituting denial of full hearing, and

the matters stated under first, second, and third relate to the evidence supporting that charge.

Part I (pp. 9-27) of their Argument is devoted to discussion of that charge and of the supporting evidence under the caption appearing on page 9.

On page 27 counsel summarize what they have shown under that caption as being, first of all,—

> "that the Commission undertook the investigation with the *announced intention* of condemning the Ohio rates and prescribing higher rates in lieu thereof;" (Emphasis supplied.)

The Commission undertook the investigation on October 3, 1932, by order of that date (R. 1855-1857). If it did so "with the announced intention" here asserted, the announcement must have been made at or about that time. When, and how, and to whom was the announcement made? Was it a public announcement? Counsel supply no answer to those questions, except by silence, and the record also is silent.

On the same day, October 3, 1932, as noted in brief on behalf of appellees Western Pennsylvania Coal Traffic Bureau et al. (p. 40), the Commission by order (R. 1941) vacated the suspension previously made by Division 2 in I. & S. No. 3801, while continuing the investigation, and thereby permitted rates on bituminous coal from mines in the Pittsburgh district on the line of the Pittsburgh & West Virginia Railway Company to destinations in northeastern Ohio to go into effect forthwith reflecting the *same reductions* from those in effect prior to August 1, 1932, as those required or permitted shortly before by the Ohio Commission in Ohio intrastate rates. This order, certainly, did not "announce" or indicate a purpose, already formed, to condemn the reduced Ohio rates and prescribe higher rates in their place.

The original order of investigation was followed by a supplemental order dated October 28, 1932 (R. 1863), and

that by a second supplemental order dated December 7, 1932 (R. 1871). Collectively the Commission's orders constitute the best evidence of the intent—the "announced" purpose and intention—with which the Commission entered upon this investigation. But counsel do not refer to them.

On the contrary they turn to the report setting forth the Commission's decision (R. 19-20) made May 2, 1933, some 8 months later, after the hearings had been completed and the issues argued and submitted, and find in its opening sentence, which they quote (p. 11), an "admission" or "confession" (p. 10) that (p. 11)—

> "the Commission entered upon the investigation into the lawfulness of the Ohio rates *resolved to find them unlawful so that it might prescribe higher rates.*"

(In this last quotation their own emphasis is retained.)

This opening sentence, as will be seen by reference to the report (R. 19), is a mere introductory and procedural recital referring to the orders by and under which the investigation was begun, carried on, and completed. These orders clearly disclose that thereby the Commission entered upon this investigation to determine, first of all, whether the Ohio intrastate rates on movements of bituminous coal, as finally designated in the second supplemental order (R. 1872)—

> "cause or will cause *any unreasonable* advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or *any undue, unreasonable, or unjust* discrimination against interstate or foreign commerce;" (Emphasis supplied).

That was the "announced" primary purpose of the investigation, and fully in accord with section 13 (4) of the Act. Then follows:

> "and *also* to determine what rates and charges, *if any*, or what maximum or minimum or maximum and mini-

> mum shall be prescribed to be charged between said origins and destinations for such transportation, *in order to remove such* advantage, preference, prejudice, or discrimination, *if any, as may be found to exist.*" (Emphasis supplied.)

This, also, is in accord with section 13 (4). The wording is practically identical with that quoted in *Wisconsin Passenger Fares*, 59 I. C. C. 391, at page 393, decided in November, 1920, one of the first decisions under section 13 (4) as amended in that year. This *Wisconsin Case*, and *Rates, Fares, and Charges of N. Y. C. R. R. Co.*, 59 I. C. C. 290, decided in the same month, were the first two of the thirteenth-section decisions to be considered by this Court. In both, the Commission's action was sustained on the same day, February 27, 1922, in *Wisconsin R. R. Comm.* v. *C., B. & Q. R. R. Co.*, 257 U. S. 563, and in *New York* v. *United States*, 257 U. S. 591, respectively. Doubtless much the same form of order has been used by the Commission in all of its thirteenth-section investigations, whatever their outcome.

The "admission" or "confession" by the Commission in the first sentence of its decision after the investigation had been completed rests on nothing more substantial than appellants' conception that the recital is not as broad or as explicit as the orders. No party could have been misled thereby. Each had the orders. And yet counsel present the recital, made long after, as proof that, to repeat the quotation already made,

> "the Commission *entered* upon the investigation into the lawfulness of the Ohio rates *resolved to find them unlawful so that it might prescribe higher rates.*"

Before the Commission the appellants made no charge of prejudgment. They made none in the court below. Wherever that fancy was conceived it first saw the light in this Court. That the Commission, in the opening words of

its decision, should "confess" wrongful intent is in itself preposterous.

Be that as it may, "prejudgment" is the meat and essence of the contention and nothing adduced by appellants save "confession" or "admission" would even tend to prove that it existed. The second and third grounds, quoted above from page 6, rest on the premise of its existence. Such reckless aspersions can not denature what the Commission said, or what it did, as disclosed by the record.

This Court, unaided by appellants' somewhat esoteric exegesis of the first sentence, might have read the Commission's decision as recording pertinent matters developed in a painstaking and protracted investigation, and conclusions reached thereon in good faith and discharge of duty. We ask the Court to so read it now.

As to the second ground, the marshalling of evidence, it might well be that, after the consolidated cases had been heard, argued, and submitted, conclusions began to take shape and be reflected in such orderly presentation and discussion as is appropriate in a report of the Commission. But counsel chose to characterize this (pp. 6-7) as an

> "attempt to marshal the evidence so as to support its *predetermination* that the reduced Ohio rates were unlawful;" (Emphasis supplied.)

The third ground, the "presumption" quoted (p. 22) from the report (R. 63), when cleared of the gloss or interpretation put upon that passage by counsel on the same page of their brief, is nothing more or other than an appraisal of the evidence before the Commission. The element of "predetermination," again is put forward as an essential element of appellants' contention that, in this and other ways named on page 6, they have been denied a full hearing.

Despite appellants' protestations (p. 12) they are really asking this Court to weigh the evidence and make find-

ings based thereon. Any possible doubt that this is their purpose is removed by their reliance, in conclusion (p. 21), upon the statement in the dissent of Commissioner Eastman to the effect that in his judgment—

> "the majority have given altogether insufficient weight to the evidence which is favorable to the Ohio rates and have accorded too much weight to the opposing evidence." (R. 69)

The report, taken as a whole, so far from indicating that the Commission based its decision upon the ground that these appellants had failed to sustain any supposed burden of proof, clearly shows that it considered all of the evidence fully and based its conclusions upon an affirmative showing that the rates were unlawful to the extent found in the report.

Appellants do not contend that they were deprived of opportunity to introduce any evidence deemed by them to be pertinent to the issues, or were hampered in presentation of their case at the hearings or on argument. Nothing in the record would support such a contention.

Therefore, since there is substantial evidence to support the Commission's findings and order, they should be sustained.

It is settled that in reviewing an order of the Commission the Court will not inquire into the soundness of the Commission's reasoning, the wisdom of its decisions, the consistency of its conclusions with those reached in similar cases (*Georgia Comm.* v. *United States*, 283 U. S. 765, 775), the weight to be given the evidence (*Florida* v. *United States*, 282 U. S. 194, 215; *State of Florida* v. *United States*, decided by this Court April 2, 1934), or the credibility of the witnesses (*Warehouse Co.* v. *United States*, 283 U. S. 501, 508).

The Court will review the evidence only for the purpose of determining whether there is substantial evidence

to support the Commission's findings and order (*Virginian Ry.* v. *United States*, 272 U. S. 658, 663; *State of Florida* v. *United States*, decided April 2, 1934), although of course it may review for errors of law.

Appellants apparently take the position (p. 12) that because the Interstate Commerce Commission fixed a scale of rates in Illinois and from Indiana into Illinois on coal in a thirteenth-section proceeding, and the Ohio Commission used those rates as a basis for some rates in Ohio, the Interstate Commerce Commission should have applied that scale in Ohio unless the operating conditions in Ohio were shown to be different from those in Indiana and Illinois.

The discussion of the Illinois and Indiana rates at pages 14-18, *supra*, is sufficient, without repetition here, to demonstrate the fallacies in that position.

The Commission by no means ignored the testimony with respect to operating conditions offered by C. B. Ackerman, referred to in appellants' brief at page 13.

Our comments on that evidence (pp. 14-15, *supra*) need no elaboration. The Commission gave to that evidence all the weight it deserved, if not more.

Obviously there is ample justification for the Commission's refusal to accept the Indiana-Illinois rates as a measure of the rates either in Ohio, or from districts in other States into Ohio, and also to refrain from accepting this particular testimony about transportation conditions as a conclusive showing of similarity of conditions in Illinois and Indiana on the one hand, and in Ohio on the other.

2. Appellants' Contentions (A) That There Is No Evidence to Support the "Alleged Finding" That the Restoration of the State Rates Was Necessary to Avoid Undue Preference and Prejudice Between Persons and Localities; and (B) That Restoration Was Not Required For That Purpose But For a Wholly Unlawful Purpose.

The second head (p. 28) of appellants' argument consists of two sentences which we distinguish in the above caption of our reply by the letters (A) and (B), respectively.

In (A) they advance the proposition that there is no evidence to support the "alleged finding" of the Commission that the restoration, required by it, of the State rates to their former level, "is necessary to avoid undue preference and prejudice between persons and localities." In their ensuing discussion (pp. 28-40) they give no inkling of where that finding is to be found. They do not quote it, or explain why they term it an "alleged finding." The restoration, of which they speak, is the remedy which the Commission saw fit to apply to the violations of law found by it to exist.

There must, of course, be substantial evidence to support the finding of violation, and that evidence abounds in the record. This Court has said that the report, like the opinion of a lower court, should contain findings of the evidential facts on which rests the conclusion or finding of ultimate fact, and these appear throughout the report.

But nowhere is it held, or said, or suggested, that the Commission, in selecting and applying such remedy as, in its judgment and within its powers, it may deem apt and appropriate to cure the violations found, shall go further and find, upon evidence addressed to that point, that this particular remedy is "necessary" to the exclusion of any other appropriate remedy which it might apply. The remedy is a matter of judgment, lies in the sound discretion of the Commission to be exercised within the scope

of its powers, and, in a case like this, is applied under express statutory authority as an exercise of quasi-legislative power to prescribe rates for the future.

What significance, then, is to be attached to the proposition advanced under (A)? As already noted, appellants' ensuing discussion affords no answer.

In (B) appellants' counsel challenge the motive which dominated the Commission in selecting and applying that remedy. As between a lawful and an unlawful motive they ascribe to it the one which they pronounce unlawful. When we turn to their development of this proposition (pp. 28-40) we note their admission (p. 29) that the report contains the necessary ultimate finding, followed by the assertion that—

> "When the body of the report is examined, however, it is found that the necessary evidentiary findings are not only entirely lacking but are replaced by findings that demonstrate the error of the ultimate finding."

In support of that statement counsel set out extracts from the report of the Commission (R. 61-63), with the comment (p. 30) that they "are all taken from the Commission's own summary of the facts upon which it acted."

Counsel's quotations from the report of the Commission comprise almost all, but not quite all, of a section of the Commission's report entitled "Summary" without any qualification by the Commission indicating that it is a "summary of the facts upon which it acted."

When therefore counsel say (p. 30) of their extracts from the "Summary"

> "They present fairly and fully the grounds for the formal findings"

it is proper to note that the Commission does not say so. Grounds for those formal findings are to be found throughout the report and, wherever found, are available to sup-

port, or put in question, as the case may be, the formal findings and ultimate conclusion.

As this Court said in *United States v. Louisiana*, 290 U. S. 70, 80:

> "There are no formal requirements for the findings to be made by the Commission in this type of case, see *Manufacturers Ry. Co. v. United States*, 246 U. S. 457, 490, * * * *the report, read as a whole, sufficiently expresses the conclusion of the Commission*, * * *." (Emphasis supplied.)

Whatever may have been the purpose of the Commission's "Summary" there are ample findings in the report, fully supported by the evidence, to sustain the ultimate finding of undue preference and prejudice between persons and localities, as sufficiently appears from pages 6-19, *supra*, where the point is discussed.

After citing some decisions to sustain their contentions counsel say (p. 35) that the rates required by the Commission, among other things, "do not conform to the transportation standard," and that:

> "The Commission found that transportation conditions from the Ohio producing districts and from the interstate producing districts to northeastern Ohio are substantially the same mile for mile."

They refer to page 35 of the record as authority for this statement. What the Commission really said on that page was this:

> "Witnesses for petitioning respondents [carriers] are in accord in their testimony that there are no substantial differences between the transportation conditions in eastern and northeastern Ohio and those prevailing from the Pittsburgh group, or any of the other groups west of the mountains in the inner and outer crescent groups, to northeastern Ohio. A witness for the Pennsylvania Railroad testified that a mile of service one place is substantially the same as a mile of service in another place in this general territory."

This is quite different in import and purport from counsel's statement of it. These findings of the Commission are commented upon at some length on pages 12-13, *supra*, to which reference is asked.

The "mile-for-mile" statement is that of one witness. Many different factors enter into transportation conditions. Among them are terminal services, *e. g.*, the furnishing and placing of cars for loading at the tipple, gathering up and removal of the loaded cars to the customary assembling point, the assembling there of those cars into cuts or trains, all before their mile-for-mile journey begins. Grades and curvatures between the tipple and the assembling point vary greatly. Later on comes the return journey of the empty car for a fresh load. But the testimony in which the carriers' witnesses were in accord was the testimony that there are "*no substantial differences between the transportation conditions,*"—all of them taken together,—in eastern and northeastern Ohio, on the one hand, and those prevailing from the Pittsburgh or any other designated group to northeastern Ohio, on the other. And, being in accord, there was no occasion for the Commission to recite the detailed testimony of their respective witnesses.

The standards here testified to are "transportation standards, not criteria of general welfare." And the Commission's finding so shows.

Counsel say (p. 31) "There is * * * no reference to distance, except to reject it."

The Commission did not reject distance. What it said was, as pointed out before (*supra*, p. 12), "mileage has always been disregarded to a very great extent * * *" (R. 58), and "distance has never been made the sole measure of these rates" (R. 62).

Counsel quote at length (pp. 38, 39) from the *Wisconsin Case* (257 U. S. 563) in its bearing upon the "first question" there presented to this Court, and say that this Court

held that the order was "bad *in toto*" (p. 38). They omit to mention that the order, a thirteenth-section order of the Commission, was further considered by the Court, and sustained.

We ask no more for the order here at bar.

3. Appellants' Third Contention is That the Commission Exceeded Its Authority in Requiring State Rates to be Raised Without Having First Found or Made Reasonable All Substantially Competitive Interstate Rates to the Same Destinations.

Appellants' argument (pp. 40-60) is grounded largely upon the fallacious premise that the rates from the Crescents are "made on the average principle" (p. 43), or "on the basis of the *average* reasonableness of the whole interstate adjustment, and not on the basis of the *individual* reasonableness of each rate" (p. 48); and that

> "the entire crescent adjustment has always been made and regulated so as to represent a reasonable *average* level, produced by some rates which, if individually considered, would be found too high, and by others which, if individually considered, would be found too low" (p. 48).

It is significant that no authority is given for these statements. There is none. On the contrary the record shows they are *not* made on any "average principle." This is made clear by the very brief outline of the adjustments given below.

Exhibit 22 (Vol. I of Exhibits, p. 143), a map (R. 589-592), gives the location of the various coal-producing districts in Ohio, Pennsylvania, West Virginia, southwestern Virginia, eastern Kentucky and eastern Tennessee. The present controversy started from a reduction of the rates, under mandatory or permissive orders of the Ohio Commission, from all of the Ohio districts except Leetonia,

Shawnee, and Jackson, to a large part, but not all, of northeastern Ohio as hereinbefore described. The Inner and Outer Crescents are indicated on Exhibit 22 by colors or other distinguishing markings.

There are four different major adjustments of the westbound coal rates from the Ohio and the Crescent districts. One is the lake-cargo adjustment, which applies on coal moving to lower Lake Erie ports for transshipment by water. It is not given in detail in the record.[10] The rate from any one district is the same to all ports to which rates are published (Exhibit 74, Vol. II of Exhibits, p. 162). The following are all the rates to Cleveland, for example, which that exhibit contains:

From	Rate in cents per ton.
Ohio No. 8	143
Pittsburgh	146
Connellsville	154
Fairmont	166

Pittsburgh, Connellsville, and Fairmont districts are all in the Inner Crescent.

Two other adjustments are summarized on Exhibit 22; one, the adjustment to "affected territory"; that is, northwestern Ohio, northeastern Indiana, and the southern peninsula of Michigan, within the broken red line; and the other, the adjustment to territory west thereof, of which Chicago may be taken as illustrative. To those two destination territories the adjustments are similar, although the differentials differ in amount. Ohio No. 8, Cambridge, Hocking, Pomeroy, and Jackson districts take the same rate to any given destination, and the other Ohio districts take differentials under the rates from those districts. The entire Inner Crescent group takes the

[10] It has been before the Commission many times and is explained in the recent decision *Lake Cargo Coal Cases, 1930*, 181 I. C. C. 37.

same rate to any point in one of those territories. That rate is 50 cents over the rate from the Hocking district to affected territory, and 35 cents over the Hocking district rate to Chicago.[11] The Outer Crescent is differentially related to the Inner Crescent.

The base for those two adjustments is the rate from the Hocking district to Toledo (R. 585), which is $1.89.

The fourth adjustment is that to northeastern Ohio. It is entirely different from the other three adjustments just described. As to rates from the Crooksville, Pomeroy, and Hocking districts in Ohio, and from the Inner Crescent districts, Kanawha and south, the part of northeastern Ohio involved here is included in the Toledo group, taking (except where changed by the reductions of August 1, 1932) $1.89 from those Ohio districts and $2.39 from those Inner Crescent districts (R. 586-588); but from the Middle, Massillon, No. 8, and Cambridge districts in Ohio, and from the Freeport, Pittsburgh, Connellsville, and Fairmont districts, in the northern part of the Inner Crescent, the adjustment is again entirely different. The rates to Cleveland given in the following table, illustrate it:

RATES IN CENTS PER TON

From Districts	Prior to August 1, 1932	August 1, 1932[a]
Middle	154	122
Massillon	154	108
Ohio No. 8	174	145
Cambridge	174	145
Freeport	184	184
Pittsburgh	184	184
Connellsville	190	190
Fairmont	199	199

[11] The legend on Exhibit 22 seems to contain a typographical error, in that it shows the Inner Crescent rate to Chicago to be 25 cents over Hocking. The legend on Exhibit 21 shows that the Inner Crescent rate to Chicago is 35 cents over Hocking.

[a] See footnote 4, p. 2.

In the foregoing table the rates from the Ohio districts are taken from Exhibit 64 (Vol. II of Exhibits, p. 142) and the rates from the other districts from Exhibit 38 (Vol. I of Exhibits, p. 254). On those exhibits the rates designated as "intrastate" are the rates as reduced under the orders of the Ohio Commission (R. 602, 636).

The base for the rates from those districts is not the Hocking-Toledo rate but the Pittsburgh-Cleveland rate. The rate from Ohio No. 8 district to Cleveland is 10 cents under the Pittsburgh-Cleveland rate (R. 579, 585). The rate from Connellsville district is 9 cents, and from Fairmont district 15 cents, over that Pittsburgh-Cleveland rate.

Manifestly the adjustment from the four Crescent districts and from the four Ohio districts named in the table above is in no sense based upon any "average principle" or "average level" of rates for the entire group of districts. When the adjustments are correctly understood the fallacies of appellants' argument become apparent at once.

In one of these very cases, docket No. 25590, the complainants therein attacked as unreasonable the rates from the western Pennsylvania districts to northeastern Ohio, including the Pittsburgh-Cleveland rate. The Commission found that rate not unreasonable. In so finding it did not treat it as part of a group rate made on an "average principle" but considered it in and of itself.

The extreme to which counsel's argument leads is made more clear by the map at the beginning of their brief than by any other one thing. They contend, in substance, that upon a specific complaint by one district, Pittsburgh, in docket No. 25590, for example, consolidated for hearing with docket No. 25566, alleging that the Ohio State rates to northeastern Ohio unduly prejudice it and unduly prefer the Ohio districts, the Commission must determine, not whether the rate from Pittsburgh district is reasonable, but whether the rates "represent a reasonable *average* level" from all the districts in both the Inner and Outer

Crescent groups extending from the Pittsburgh and Altoona districts on the north to the Pine Knot and Rathburn districts on the south (Rathburn being only a few miles from the Alabama State line), all of which other districts take higher rates to northeastern Ohio than the rates from the Pittsburgh district.

Counsel assert (p. 48) that their position on this point finds full support in the Commission's decision in *Virginia Corporation Commission* v. *A. & R. R. R. Co.*, 136 I. C. C. 173, and (p. 49) that the situation in that case

> "was identical in all essential respects with the facts in the case at bar."

A comparison of the situation in the case at bar, as outlined above, with the true situation in the *Corporation Commission Case* makes it at once apparent that so far from being identical in all respects, there is not the remotest resemblance between them.

In the *Corporation Commission Case* the Commission had before it an adjustment of long standing as modified by certain former decisions referred to in its report. That part of Virginia lying generally on and south of the line of the Norfolk & Western Railway from Roanoke on the west to Norfolk on the east constituted a single group of origin, the shipping points in which are collectively called the Virginia cities (see p. 174 of that report). The entire Virginia-cities group took the same rate to any individual point, such as Raleigh, North Carolina. (See also quotation below from p. 175 of the report.) This group adjustment had been modified by the decisions referred to, so that a scale for distances up to 200 miles had been established which was to be applied from any one of these so-called "Virginia cities" to any point in North Carolina where the scale resulted in a rate lower than the group rate; but, if the group rate was lower than the scale then it, and not the scale rate, was applied.

After pointing out that if by the earlier decisions, a distance scale had been substituted for the group adjustment that scale would have been lower than the one in question, and after pointing out, also, that the scale and *not* the group adjustment was under attack in that case, the Commission said at page 175:

> "Thus at the present time there are two sets of rates from the Virginia cities to North Carolina, the distance scale referred to, which applies from each of the Virginia cities over single-line routes for distances to 200 miles, wherever it is lower than the group rates, and the latter, which apply from the Virginia cities as a group to grouped destinations. The two sets of rates are published for alternative application, whichever is lower."

In no part of the Crescent adjustment, however, is there any mileage scale applicable, or any system of alternative rates, mileage or otherwise.

It will readily be seen, therefore, that the adjustment involved in the *Corporation Commission Case* had not the remotest resemblance to the adjustment from the Pittsburgh, Freeport, Connellsville, and Fairmont districts to northeastern Ohio.

Obviously, under the adjustment in effect from the Virginia cities the Commission properly refused to pass upon the reasonableness of that scale apart from the rate from the Virginia-cities group, which was one group, and not a series of groups related one to the other. The very cases that counsel cite (p. 51) in support of their position that, in considering the reasonableness of "*a* group rate" (italics added) the whole group must be examined, show clearly that what the Commission found, and properly found, was that in dealing with rates from a *single* group the entire group was to be considered and not one point only in the group. Those cases do not support a contention that rates from *different* districts, each with a dif-

ferent rate to a common destination, are to be tested by the average distance or average level of rates from all of the districts as though they constituted one group.

With this general statement it seems unnecessary to point out in detail how counsel, particularly on page 50, have taken, apart from their context, phrases from the *Corporation Commission Case* and attempted to apply them in support of their argument.

On pages 55-56 counsel say that the Commission erred in finding that the ex-river rates were not in issue and suggest that this Court consider a later decision of the Commission dealing with the ex-river rates. The issue was not presented in the case at bar, and these appellees will not consent to a consideration in this proceeding of that ex-river decision now pending before another court.

4. Appellants' Contention That the Order is Invalid in so Far As It Undertakes to Remove Revenue Discrimination.

This point is beyond the scope of this brief and we leave it to counsel for other appellees whose briefs discuss it.

V.

CROSS APPEAL.

The cross appeals are sufficiently discussed in briefs of other cross appellants and we have nothing to add.

VI.

CONCLUSION.

It is clearly established that the Commission has made the necessary evidentiary and ultimate findings of fact, all supported by substantial evidence, to sustain its finding of undue preference and prejudice as between persons and

localities in intrastate commerce on the one hand and interstate commerce on the other hand. Its order is valid and should be upheld. Therefore the decrees of the lower court should be affirmed.

Respectfully submitted,

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ALEX. M. BULL,
Counsel for Robert C. Hill et al., Receivers of The Consolidation Coal Company et al., Appellees in No. 868 and Cross Appellants in No. 886.

716 Jackson Place, N. W.,
Washington, D. C.,
April 28, 1934.

CERTIFICATE OF SERVICE

We hereby certify that we have this day served copies of this brief upon counsel for all adverse parties by mailing the same properly addressed, postage prepaid.

Dated at Washington, D. C., this 2nd day of May, 1934.

HENRY C. HALL,
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Counsel.